N. 2730

No. 13011

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNICE FEITLER and IRWIN FEITLER,
Individually and Trading as Gardner & Company,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONERS.

PETITION TO REVIEW AN ORDER OF
THE FEDERAL TRADE COMMISSION

F. W. James,
9448 Drake Ave.,
Evanston, Ill.,
Attorney for Petitioners.

Of Counsel:
George E. Lindelof, Jr.,
215 West Seventh Street,
Los Angeles, Calif.

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STATEMENT OF THE PLEADINGS.

The Commission issued its complaint on the 28th day of August, 1940. The complaint alleges in substance as follows: that the petitioners manufacture push cards and punch boards, selling and distributing them in interstate commerce to manufacturers of and dealers in, various other articles of merchandise. Some of the push cards and punchboards are so prepared that when used by persons other than Petitioners in selling merchandise to the consuming public they involve games of chance.

Many persons who sell and distribute candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in interstate commerce purchase Petitioners' push cards and punchboards, pack and assemble them together with merchandise and sell them to retail dealers. Other retail dealers purchase the cards and boards directly from Petitioners and make up their own assortments.

The retailers sell the merchandise to the purchasing public by means of the push cards and punchboards.

The element of chance involved induces members of the public to deal with such retailers and this in turn induces retailers to deal with manufacturers and wholesalers who assemble their merchandise with the push cards and punchboards.

The respondents thus supply to, and place in the hands of, and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce within intent and meaning of the Federal Trade Commission Act.

Petitioners' answer amounts to a general denial.

STATEMENT OF THE FACTS.

Petitioners manufacture punchboards and push cards which they sell to other persons, firms and corporations. Some of petitioners' products are used to distribute merchandise. The only persons, firms or corporations who use punchboards as chance devices to distribute merchandise are persons, firms and corporations who are engaged exclusively in intrastate commerce.

After issues were joined the Commission held hearings in Terre Haute, Indiana, Chicago, Illinois, Milwaukee, Wisconsin, Minneapolis, Minnesota, South Bend, Indiana, Indianapolis, Indiana, Louisville, Kentucky, and Ottumwa, Iowa. At these hearings most of the testimony introduced by the Commission was indirect and opinion evidence.

At the Petitioners' request the trial examiner set hearings in Salt Lake City, Utah, Seattle, Washington, Portland, Oregon, San Francisco and Los Angeles, California.

At the hearing in Salt Lake City the attorney for the Commission, after the first main witness called by the Petitioners had finished testifying, made a motion to strike all of the witness' testimony. The Trial Examiner granted the said motion upon the sole ground that the testimony of the witness did not tend to disprove the evidence introduced by the Commission. Because of this ruling the hearings scheduled for Seattle, Portland, San Francisco and Los Angeles were cancelled. Subsequently the Petitioners filed a motion with the Commission requesting the Commissioners to make an order setting aside this ruling of the Trial Examiner. The motion was denied. Several times thereafter Petitioners requested hearings at different cities. The Trial Examiner in denying Petitioners' requests to have hearings at certain designated places made the following rule:

> *"I now feel that respondents are entitled to negative testimony that has been presented against them. Since this testimony had to do with conditions existing in fairly well defined territory, it seems to me that any bearing that conditions existing in other and far remote territory may have to negative the testimony for the Commission is too vague and indefinite to justify the admission of testimony on those conditions in this case at this time, though the testimony might become material if an order should issue and steps for enforcement in other territory were taken."*

The Commission having refused to set hearings at locations requested by the Petitioners, the Petitioners held hearings at places wherein the Commission had held hearings. However, Petitioners were not able to introduce the type of evidence that they desired to introduce. The Trial Examiner closed the taking of testimony in this proceeding and the attorney for the Commission and the attorney for the Petitioners submitted to the Trial

Examiner proposed findings of fact. The Trial Examiner ignored the proposed findings submitted by the Petitioners and adopted almost *verbatim* the findings submitted by the Commission. Thereafter Petitioners filed a motion supported by affidavits, with the Commission requesting that the above ruling of the Trial Examiner be set aside and that hearings be scheduled at certain designated cities. The Commission denied this motion. After the attorney for the Commission and the attorney for the Petitioners submitted briefs and argued the matter orally before the Commission, the Commission made its report as to the findings of fact and issued its order to cease and desist.

The findings are in substance the same as the allegation of the complaint. The order is as follows:

> "It is Ordered that the respondents, Bernice Feitler and Irwin Feitler, individuals trading under the name of Gardner & Company, or trading under any other name, their agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from:
>
> Selling or distributing in commerce, as 'Commerce' is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

This order is much broader than the allegations in the complaint and the findings of fact.

Grounds of Jurisdiction.

The petition filed in this Court alleges that petitioners do business within the jurisdiction of this Court.

Section 5 of the Federal Trade Commission Act (52 Stat. 111; 15 U.S.C.A., Sec. 45.) provides in part as follows:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * *".

Statement of the Case.

This case involves first the question of due process of law and second the jurisdiction of the Federal Trade Commission.

Assignments of Errors.

1.

The hearing granted petitioners herein did not comply with the due process clause of the Constitution nor with the Administrative Practice Act.

2.

The Commission does not have jurisdiction to restrain the interstate shipment of push cards and punchboards.

3.

The order issued herein is broader in scope than the complaint and the findings.

4.

The order issued herein is too broad.

5.

This proceeding by the Commission is not in the public interest as required by the Federal Trade Commission Act.

ARGUMENT.

As the order to cease and desist issued herein was not obtained by due process of law it is null and void and must be set aside.

All cease and desist orders issued by the Federal Trade Commission which are not moored to and anchored in due process of law are not only null and void but must be summarily set aside. If in reviewing a proceeding conducted by the Federal Trade Commission wherein a cease and desist order has been issued, it appears that due process of law has not been fully, strictly and completely complied with the court has no alternative but to set aside the order on this ground alone without going into the merit on the issues raised by the pleadings. Fortunately by virtue of the constitution no administrative agency has nor can it be given jurisdiction to issue a cease and desist order without first proceeding strictly in accordance with the inexorable safeguards of due process. The least or slightest deviation by the Commission from any of the requirements of due process vitiates all jurisdiction possessed by it to issue a final order. When due process is involved the ultimate result no matter how beneficial it may be can never justify the sacrifice of due process. In plain words, the safeguarding of due process is more important to the maintaining of a democracy than is the elimination of unfair acts and practices. In fact, our government proceeded very nicely from its inception until 1914 without the benefit of the Federal Trade Commission, but without due process of law a democracy would be of very short duration. Due process is the most important ingredient in the foundation upon which all

democracies are founded. It is the bulwark protecting free loving people against tyrany, without it tyrany would rage on unmolested. Because of these reasons the Supreme Court has emphatically and consistently held that whenever it appears that an Administrative order has been obtained without the strictest compliance with all of the ramifications of due process of law the order must be set aside.

A full and fair hearing is one of the cardinal essentials of due process of law. Unless the hearing conducted is of such a nature as may be required for a full and true disclosure of all of of the facts due process of law has not been complied with. On this point we set out the following from the Supreme Court:

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.,* 277 U. S. 88-91:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercises of power.
>
> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair."

This case is especially applicable to the case at bar; the Commission herein disregarded all the rules of evidence,

and capriciously made findings and issued its order by administrative fiat.

St. Joseph Stock Yards Company, Appellant, v. *United States and the Secretary of Agriculture,* 298 U.S. 38:

> "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to. value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice *and opportunity to be heard;* that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed." (Emphasis provided).

And in the case of *The Ohio Bell Telephone Company* v. *The Public Utilities Commission of Ohio,* 301 U. S. 292:

> "Regulatory Commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1), supra,* p. 70; *West Ohio Gas Co.* v. *Public Utilities Commission (No. 2),* 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California,* 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States,* 298 U.S. 468, 480, 481; *Interstate Commerce Commission* v. *Louisville & N. Ry. Co., supra.*

The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co.,* v. *Polt,* 232 U.S. 165, 168, assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1), (No. 2), supra; Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 682, *Cf. Norwegian Nitrogen Co.* v. *United States, supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

On this point the Administrative Practice Act provides "* * * every Administrative Agency shall afford all interested parties the right to present his case or defense. * * * *As may be required for a full and true disclosure of the facts."* Emphasis provided)

Petitioners contend that because of the following ruling made and adhered to by the Trial Examiner and upheld and adhered to by the Federal Trade Commission the petitioners herein were deprived of a full and fair hearing. The said ruling is as follows:

"The respondents (petitioners here) are only entitled to introduce evidence which will negative the testimony that the Commission has introduced and that hearings on behalf of the Petitioners can only be had in the same territory in which the Commission held hearings (Tr. 35). The Trial Examiner in denying petitioners' motion to have hearings at certain places stated, 'I now feel that respondents are entitled to negative testimony that has been presented against them. Since this testimony had to do with conditions existing in fairly well defined territory, it seems to me that any bearing that conditions existing in other and far remote territory may have to negative the testimony for the Commission is too vague and indefinite to justify the admission of tes-

timony on those conditions in this case at this time, though the testimony might become material if an order should issue and steps for enforcement in other territory were taken.' '' (Tr. 33-37).

The fallacy and absurdity of this ruling is made apparent by the following illustrations;

First, take a case where one of the material issues is, what was the condition of the brakes of one of the automobiles involved in an accident? The plaintiff at the trial calls a witness who testifies that he saw the accident and went over and looked at the cars, but made no examination; he testified that in his judgment the brakes on the car were defective. This evidence proves the indirect fact that the witness is of the opinion that the brakes were defective. From this indirect fact standing alone the ultimate fact, that the brakes were defective, may be inferred. To negative the inference which may be drawn from the fact that the witness was of the opinion that the brakes were defective and to establish what was the true condition of the brakes at the time of the accident the defendant in rebuttal offers in evidence one witness who would testify if permitted that he relined the brakes and adjusted them within 10 days prior to the accident and another witness, a mechanic, who would testify that he examined the brakes immediately after the accident and found them in perfect condition. Under the ruling of the Trial Examiner these two witnesses would not be allowed to testify because their testimony does not tend to negative the testimony of the plaintiff's witness, which is that the witness is of the opinion that the brakes were defective.

Such a ruling amounts to changing the issues involved. The issue should always be, ''Were the brakes defective?'' But under the Trial Examiner's ruling the issue is, did

the plaintiff's witness have the opinion that the brakes were defective? By virtue of such a ruling defendants are deprived of the right to introduce evidence bearing on the true issues, being limited to the introduction of evidence to disprove the opinion of the Commission's witnesses which is not an issue in the case at all.

The second illustration: the question involved in a case is the speed of an automobile at the time of an accident. The plaintiff at the trial introduces a witness who testifies that a mile away from the accident the car in question when it passed him was traveling at a rate of 65 miles an hour. In rebuttal the defendant wishes to show that between the point where the witness saw the car and the point of accident the car stopped for a stop sign and at the time of the accident was not exceeding 10 miles an hour. Under the Trial Examiner's ruling this testimony would not be admissible because it does not tend to disprove the testimony of the plaintiff's witness.

The same is true in this illustration as in the other illustration, the issues have been changed. The real issue in the case is, how fast was the car traveling at the time of the accident? But the ruling confines defendant's testimony to the issue, how fast was the car traveling when it passed the witness? The defendant is not allowed to introduce any evidence bearing upon the real issue, the rate of speed at the time of the accident.

In each of the above illustrations the testimony of the witness for the plaintiff is technically inadmissible, primarily because the probative value of the testimony is not sufficient to make the evidence competent. However, as the Commission is not bound by the technical rules of evidence, such testimony was introduced and accepted by the Commission. In fact in the case at bar practically all

if not all of the Commission's testimony is of this caliber, being mainly opinion and indirect evidence. In spite of this, when the petitioners attempted to introduce evidence to substantiate the real issues involved and to show the inaccuracy of the opinion evidence introduced by the Commission and to introduce direct evidence to negative any probative value that the Commission's indirect evidence may have, the trial examiner affirming the above ruling refused the plaintiffs the opportunity to introduce their evidence.

Such a hearing is more vicious than no hearing at all because if no hearing was had, there would be no evidence, but in such a hearing as was granted, the Commission introduced evidence which by a wild use of the imagination may be sufficient to sustain their findings, whereas if no hearing was granted this remote and incompetent evidence would not be in the record. Plaintiffs feel certain that they can contend without any fear of contradiction that to be granted a hearing wherein the weakest type of circumstantial evidence, or what might be called, indirect incompetent evidence, is the only type of evidence introduced by the Commission, and when petitioners attempt to introduce direct competent evidence to negative any probative value this testimony may have and also to establish the ultimate facts by direct evidence the Trial Examiner rules that the proffered evidence is not admissible upon the sole ground that it does not tend to disprove the testimony introduced by the Commission, and further rules that the only evidence that the plaintiffs will be allowed to introduce is evidence which will tend to disprove the Commission's evidence; the hearing thus granted the petitioners is more prejudicial than no hearing at all.

The ruling not only deprived the petitioners from introducing evidence on the main issues involved in the proceedings but limited the territory wherein plaintiffs could have hearings to the territory wherein the Commission conducted hearings.

It is beyond the comprehension of the writer, what the Examiner had in mind when he ruled that;

> "Since this testimony had to do with conditions existing in fairly well defined territory, it seems to me that any bearing that conditions existing in other and far remote territory may have to negative the testimony for the Commission is too vague and indefinite to justify the admission of testimony on those conditions in this case at this time, though the testimony might become material if an order should issue and steps for enforcement in other territory were taken."

What can it mean to say that the testimony is not admissible now but will be if steps for enforcement in other territories were taken? The fallacy of such a ruling seems to be self evident.

The above makes it self evident that the petitioners were not granted a fair and full hearing, therefore, the order must be set aside.

The interstate shipment of punchboards is not a practice deemed undesirable by the Congress.

This court in the case of *Lichtenstein* v. *Federal Trade Commission,* 194 F. (2) 607, stated;

> "The object of the Federal Trade Commission Act is to reach not merely in their fruition but also in their incipiency trade practices deemed undesirable by the Congress. *Cf. Fashion Guild* v. *Trade Comsion,* 312 U.S. 457, 466, and *Federal Trade Commission* v. *Raladam Co.,* 316 U.S. 149, 152."

This principle of law has no application to the interstate shipment of punchboards to persons, firms or corporations who use them exclusively in intrastate commerce, whether or not the boards are used to distribute merchandise. Under such a transaction there are two facts or acts involved: first, the act of shipping the punchboards in interstate commerce; second, the act of using the punchboards so shipped to distribute merchandise in intrastate commerce. Neither one of these acts or practices have ever been held by the Congress to be undesirable.

The Congress has had before it on several occasions bills to prohibit the interstate shipment of gambling devices, which would include the interstate shipping of punchboards, but not one of these bills has ever been passed by the Congress. If Congress had considered this Act undesirable it would have been a simple matter to have passed one of these Acts or to have included the prohibition of the interstate shipment of punchboards in the Federal Trade Commission Act or in the Slot Machine Act: but Congress emphatically rejected its inclusion into either of these enactments. In addition this court in the *Lichtenstein* case said:

> "The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 44 (Cir. 3) is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co.* v. *Federal Trace Commission,* 124 F. 2d 640 (Cir. 3), made it clear that trade practices were the sole concern of the Commission."

From the above it is clear that Congress has never deemed the interstate shipment of punchboards as undesirable.

Also, Congress has never deemed the intrastate use of punchboards to distribute merchandise or otherwise as undesirable. To this effect the Supreme Court in the case of *Federal Trade Commission* v. *Bunte Bros.,* 312 U.S. 349, held that Congress in the passing of the Federal Trade Commission Act expressly indicated that the intrastate use of punchboards was not deemed undesirable by it. If the Congress had at the time of the passing of the Federal Trade Commission Act or at the time of its amendment in 1938 deemed the intrastate use of punchboards to distribute merchandise undesirable it certainly would have granted the Commission power to prevent these acts and practices; or if subsequently the Congress deemed them undesirable it would have been and is now possible to prohibit these intrastate transactions. However, the Congress to date has still refrained from doing so.

The Congress' refusal to deem these intrastate transactions undesirable is based upon a very salutary basis. This basis is the proper respect that Congress has for our dual system of government. The only way that a Federal Government can be maintained is, that the Central Government must exercise a proper respect for the rights and prerogatives of the states which make up the Federation. Under this system of Government the question as to the desirability of the use of punchboards in strictly intrastate commerce must be left exclusively to the states.

In addition to the fact that the interstate shipment of punchboards is not deemed undesirable by the Congress, "the principle of law," that the purpose of the Federal Trade Commission Act is to reach undesirable acts and practices not merely in their fruition but also in their incipiency" has no application in this case. We make

this statement because the practice of shipping punchboards in interstate commerce has been going on for many years and whatever use the boards are put to, also, has existed for many years, therefore, there are no practices in this regard in their incipiency. This point will be emphasized in the discussion of the next point.

The use of punchboards to distribute merchandise has not spread into line after line of merchanidse.

This Court in the *Lichtenstein* case said,

> "The language of the Supreme Court in *Phalen* v. *Virginia,* 49 U.S. 163 (1850), as to the 'pestilence' of lotteries which 'enters every dwelling * * * reaches every class * * * and preys upon' and 'plunders the ignorant and simple' applies with force many times multiplied to the spread of lottery methods into line after line of merchandise."

The petitioners believe that the court and the Commission have an erroneous conception as to the magnitude and significance of the use of punchboards generally and expressly in their use in the distribution of merchandise. This erroneous conception entertained by the courts and the Commission seems to be predicated on the misconceived idea that because of the innate instinct to take a chance possessed by every human being, punchboards have a magnetism strong enough to and do draw everyone to them: thereby making the use of punchboards to distribute merchandise not only an undesirable practice but a pestilence.

Had the petitioners been afforded a proper hearing, that is one which complied with due process of law and the administrative practice act there would now be in the record "a full and true disclosure of the facts," which would show the fallacy of the above conception of the use of punchboards.

A full and true disclosure of the facts would establish the following:

The true situation surrounding the distribution of merchandise by the operation of punch boards is that very few people punch the boards; that the percentage of merchandise distributed by their use is negligible; that the number of establishments where boards can be operated is minor, and the variety of commodities that can be used as prizes is limited.

Contrary to the belief that many people punch the boards and to the Commission's finding (Tr. 31)

> "Members of the purchasing public have been induced to trade or deal with retailers selling or distributing their merchandise through the use of such devices."

The correct fact is that the punch boards have absolutely no appeal to the purchasing public; the purchasing public does not punch the boards. If petitioners' evidence was a part of the record herein the Commission's above finding would not be supported by the evidence for the reason that the petitioners' proposed finding on this point (sup. rt. 103 and 104) would be the only finding that the evidence as a whole would sustain on this issue. If the use of punch boards appealed to the purchasing public and to the public as a whole their use would be found in every retail store. The very opposite of this is the fact; punch boards are never found in a strictly retail store and are found only in places that do not retail the commodities used as prizes; their use is confined to taverns, pool halls and places wherein people are encouraged to loiter. The number of people that punch the boards equals about one in every thousand.

Contrary to the belief that the use of punch boards is spreading into line after line of merchandise, the fact is that because of the very nature of the appeal and use of punch boards a very small percentage of the total volume of merchandise sold and distributed is distributed by punch boards; this percentage is infinitesimal.

The use of punch boards to distribute candy is a very good illustration on this point. Punch boards have been used for years to distribute candy. The candy industry can be divided conveniently into about ten different branches. Of these different branches the fancy package branch is the smallest in volume, being about one percent of the total candy volume. The use of punch boards is confined exclusively to this smallest branch. The total amount of candy distributed by the use of punch boards does not exceed one-tenth of one percent of the total candy volume. If the use of punch boards had the capacity or tendency to spread into line after line of merchandise their use certainly would have spread into the different branches of the candy industry. However, after all these years of the use of punch boards in this industry their use is still confined solely to the fancy package branch, and the relative percentage to the volume of candy distributed by their use has remained the same, about one-tenth of one percent. The fact that the use of punch boards has not been able to spread into other branches of the candy industry, if not conclusive proof, has great weight in establishing that their use cannot spread into all lines of merchandise. The fact that the percentage of the volume distributed by the use of punch boards has remained constant, is also enough to prove that the use of boards does not possess the propensity to spread or increase.

The fact that the use of punch boards has been unable to spread into strictly retail stores and stores that retain the merchandise used for prizes and is still confined to the particular kind of places of business wherein people are solicited to loiter shows conclusively that their use cannot spread. This fact, also, establishes that punch boards have no appeal to the purchasing public and further establishes that not many places of business can use them.

Thus it is, the use of punchboards to distribute merchandise does not have the capacity or propensity to spread into line after line of merchandising, and the substantiality of their use is negligible.

Petitioners Proposed Findings of Fact Should Have Been Adopted.

Pursuant to the Federal Trade Commission rules petitioners submitted proposed findings of fact. The Trial Examiner and the Commission absolutely ignored them. These proposed findings are set out on pages 97-106 of the Supplement transcript of record. They speak for themselves and a casual reading of them will make it obvious that the Commission was in error in not adopting them as the Commission's findings in this case.

From what has been said above it seems to be self evident that petitioners' motion should be granted and this case returned to the Federal Trade Commission with instructions to set hearings at proper places and allow the petitioners to introduce their proffered evidence.

The decision in the case of Globe Cardboard Novelty Co. et al v. Federal Trade Commission, 192 F. 2d 444 is predicated upon an erroneous principle of law.

In the *Globe* case, *supra,* the court said,

> "Since the decision of the Supreme Court in *Federal Trade Comm.* v. *Keppel & Bro.,* 291 U.S. 304 (1934), it has been settled law that the sale of merchandise by lottery methods constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. Thus, we accept as our starting point the proposition that it is contrary to the public policy of the United States for sellers to market their goods by taking advantage of the consumer's propensity to take a chance. Petitioners actively aid and abet others to commit such unfair practices."

As the entire opinion in this case is based upon this erroneous interpretation of the *Keppel* case the holding therein is erroneous and should not be followed. The *Keppel* case did not settle that the sale of merchandise by lottery method constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. The Supreme Court in that case simply held that under the findings of the Federal Trade Commission the *Interstate* shipments of break and take because of their adverse effect on interstate competitors is an unfair method of competition within Section 5 of the Federal Trade Commission Act. The holding that case is limited strictly to interstate transactions.

This principle of law is contrary to the principle of law on this point announced by Justice Minton, that the *Keppel* case is not in point nor has it any application to a case wherein the mere shipping of punchboards in interstate commerce is the only issue. *Modernistic Candies* v. *Federal Trade Commission,* 145 F. 2d 454.

Some time after the *Keppel* case the Supreme Court in the case of *Federal Trade* v. *Bunte Bros.,* 302 U.S. 349 held that the intrastate sale or distribution of merchandise by lottery methods did not constitute unfair methods of competition under Section 5 of the Federal Trade Commission Act, so that when the Third Circuit Court of Appeals assumed that the *Keppel* case held that such transactions were a violation of the Federal Trade Commission Act it ignored the holding in the *Bunte* case and in reality overruled the Supreme Court.

From the quoted portion from the *Globe* case, *supra,* it is self evident that the court in that case predicated its decision on the principle of law that the aiding and abetting of others to violate the Federal Trade Commission Act is within the purview of said act. This being the real basis of the decision the case cannot be used as authority to hold that the aiding and abetting of the intrastate use of punch boards to distribute merchandise comes within the jurisdiction of the Federal Trade Commission.

In the case of *Charles A. Brewer & Sons* v. *The Federal Trade Commission,* 158 Fed. 274, the court says,

> "Thus, it is established beyond controversy that the Federal Trade Commission stands upon solid ground in declaring the sale of merchandise by lottery methods is in contravention of the public policy of the United States."

Petitioners take issue with the court on this principle of law. It cannot be said that the sale of merchandise by lottery method has been singled out as being the only form of gambling or lottery that is against the public policy of the United States. If this form of lottery or gambling is against the public policy of the United States

then every form of gambling and every lottery must be placed in the same category. This being true, if the decision in the *Brewer* case is sound the Federal Trade Commission would have jurisdiction to stop any act in interstate commerce which aids and abets others in any form of intrastate gambling. Under such a holding the Commission would have authority to stop the interstate shipment of horses which are to be used at the different race tracks and the interstate shipment of the pari mutuel machinery. It could stop the interstate shipment of playing cards which are to be used in gambling and all the other items such as dice, roulette wheels, card tables and slot machines. Never has Congress nor any of the courts until the *Brewer* case, assumed, hinted or intimated that the Federal Government had the jurisdiction or power to form a public policy towards a strictly intrastate transaction. There is more money wagered at one meeting at the Santa Anita Race Track than there is wagered in one year on all the punch boards in the United States. There is no reason or logic upon which it can be maintained that the betting on the races at the track is not against the public policy of the United States but the intrastate use of punch boards to distribute merchandise is.

In addition to the illustration of the race track, let us call attention to Keno, Bingo games, Bank Night, and dice games. Most of these games are used for the distribution of merchandise, so that they are perfect illustrations.

The interstate shipment of punch boards to be used to distribute merchandise is not within the purview of the Federal Trade Commission.

The following portion of the brief is inserted primarily for the purpose of preserving the points discussed and

secondly because perhaps the writer's ideas were not clearly enough explained in the *Lichtenstein* and *Bork* cases.

The Federal Trade Commission Act confines the Commission's power to the stopping of the use of unfair methods of competition or unfair or deceptive acts and practices in commerce. The theory of the *Brewer, Globe, Hamilton, Bork* and *Lichtenstein* cases is that under such a statute the Commission has the right to stop anyone who aids, abets, induces or procures others to violate the act. In other words the theory of these cases is that the word, "using" can be construed to mean aiding, abetting, inducing and procuring.

The petitioners contend that such a construction is not permissible under the rule of strict construction which must be applied to the Federal Trade Commission Act.

Under the rule of law laid down by the Supreme Court in the case of Federal Trade Commission v. Bunte Bros. The order issued herein is too broad.

As has been shown above the *Brewer* case and the *Globe* case sustained a Federal Trade Commission order which was as broad as the order issued in this case. The order restrains the petitioners from shipping boards not only to people who use them in a manner which violates the Federal Trade Commission Act but to people who use them in intrastate transactions which transactions have been held by the Supreme Court not to be within the jurisdiction of the Federal Trade Commission It is the petitioners' contention that the order herein must be modified to be within the principle of law announced in the *Bunte* case.

The words "or may be used" should be deleted from the order.

The order provides in part as follows:

> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, push cards, punch boards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

The petitioners contend that the words "Or may be used" should be deleted from the order. *Cf. Hamilton Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 346 (D.C. Cir.), decided January 24, 1952; *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. 2d 261 and cases there cited.

Petitioners' Boards Are Not Gambling Devices Per Se.

All of petitioners' boards are numerically keyed to an answer book. Every ticket in every board has printed upon it a question and a book containing the correct answer to each question is furnished. This places petitioners' boards in the same category with playing cards, dice, and all similar devices. *D'Orio* v. *Startup Candy Company,* 71 Utah 410, 266 Pac. 1037, 60 A.L.R. 338; *The Question Game Company* v. *Ploner,* 273 Ill. Appellate 187; *D'Orio* v. *Cataland,* 260 Ill. App. 626; *D'Orio* v. *Jacobs,* 151 Wash. 297, 275 Pac. 563; *Johnson* v. *McDonald* 132 Ore. 622, 287 Pac. 220.; *Boatwright* v. *State,* 118 Texas R. 381, 38 S. W. 2d 87.

This Proceeding Is Not in the Interest of the Public

This court in the *Lichtenstein* case said:

> "Petitioner further urges that the prevention of the use of its gambling devices in the sale of mer-

chandise to the ultimate consumer is not in the public interest."

These petitioners make no point as to whether or not it is to the interest of the public to prevent the use of gambling devices in the sale of merchandise to the ultimate consumer. Our point is that as this proceeding is not against such a practice nor has it any effect upon it, this question is not involved in the case.

As this proceeding will not have any effect upon the use of gambling devices in the sale of merchandise to the ultimate consumer, as to this end the proceeding is a nullity. It certainly is not to the public interest to have the Commission incur all the expenses incident to the prosecution of these proceedings when the result is a nullity. The public can best be protected from this use of gambling devices by local law. Local laws are adequate enough to give the public proper protection, without any help from the Federal Government, especially when the attempted help is futile.

The petitioners respectfully submit that the above order should be set aside. If not set aside, it should be modified.

Respectfully,

F. W. James,
Attorney for Petitioners.

Of Counsel
George E. Lindelof, Jr.